LAWRENCE G. TOWNSEND
Attorney at Law
Intellectual Property and Unfair Competition Law
455 MARKET STREET, 19TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105
(415) 882-3288

Fax (415) 882-3299
email lgt@lgt-law.com

December 14, 2001

Renata B. Hesse
Antitrust Division
U.S. Department of Justice
601 D Street NW, Suite 1200
Washington, DC 20530-0001

Re: **Microsoft Settlement: *United States v. Microsoft***

Dear Ms. Hesse:

Taking up the public's right to comment on the Microsoft Settlement (as required by the Tunney Act), I write in three capacities: (1) an intellectual property attorney, (2) a consumer of software products, and (3) a novelist. As to the latter, I've written a novel entitled *Secrets of the Wholly Grill* (publication February 2002, Carroll & Graf)[1] on the subject of a software monopolist's behavior and the consequences if that behavior is not adequately checked. Based on my experience, a review of the Proposed Final Judgment and having given *considerable* thought to the behavior of a software monopolist,[2] I believe that a License Committee, similar in nature to the Technical Committee, should be created and implemented, all as is more fully explained below.

In the novel—which in hindsight can stand in as an amicus brief—a hypothetical company by the name of ThinkSoft monopolizes the market for operating systems and software for artificial intelligence called "reasonware" that is used by everyone for all manner of decision-making. It then leverages its market power to expand into a new

---

[1] Subtitled *A Novel About Cravings, Barbecue, and Software*; additional information, including excerpts, may be found at www.whollygrill.com (January 2002).

[2] The value of novelists in assisting the legal system in gauging justice, especially where human behavior is at issue, cannot be underestimated. Examples abound. When our nation and lawmakers adopted the Thirteenth Amendment, no amount of data or reports from slave trade analysts came close to the distilled accuracy of *Uncle Tom's Cabin*.

market—outdoor cooking information systems (whose predecessor market was backyard barbecue grills). In so doing, ThinkSoft engages in a wide range of anti-competitive, high-handed and sharp practices that harm consumers financially, physically and emotionally.

There are many illuminating parallels between Microsoft and ThinkSoft. By way of example, the following events in the story should be self-explanatory. In entering the new market, ThinkSoft bundles its trade secret-protected barbecue sauce with the hardware, and consumers are forbidden under the strict end user license agreement from using any other sauce. Competitors don't stand a chance. When an end user bastes with another sauce or attempts to use the proprietary sauce on a competitive grill, not just a crash occurs; rather, physical violence, among other harms, is visited upon the end user.

In moving aggressively into new and unanticipated markets—the latter being a hallmark of the software industry—ThinkSoft proves to be a mindless market-eating machine. Thus, in expanding into the outdoor cooking market, ThinkSoft metes out punishment to its competitors and abuses ever-hungry consumers, all with the design and effect of capturing, maintaining and exploiting its ill-gotten dominance in that market.

The centerpiece of ThinkSoft's abusive conduct is its licensing practices. The Wholly Grill End User License Agreement is attached to the amicus brief as Exhibit A, pages 335 to 336. Here follows a telling excerpt:

> 1. The Company grants you a non-exclusive worldwide perpetual license, unless sooner terminated as provided herein, to use and operate the Information System, but only as delimited by this License Agreement.
>
> **2. You will only use the Information System when connected by the Information System modem to the proprietary outdoor cooking information and control server hosted by the Company, namely, the Wholly WAN (Wide Area Network) Optimization of Research and Development ("the Wholly WORD").** In no event shall the Company be responsible for your inability to connect with the Wholly WORD or any interruption of service you may experience, including loss or spoliation of meats, fish and other perishables.

> 3. **You agree to use Wholly Grill Outdoor Cooking Information System Barbecue Sauce with Smoke Crystals ("the Information Sauce") and only the Information Sauce in connection with your operation of the Information System and no other sauce or marinade, whether purchased or homemade.** Use of any sauce other than the Information Sauce, or use of the Information Sauce on any system other than the Information System, could result in injury or death for which the Company cannot be held responsible. (Emphasis supplied)

ThinkSoft requires its end users to obtain grill control server services from ThinkSoft's proprietary Wholly WORD; the latter (analogous to a Microsoft Middleware Product as defined in the Judgment albeit a service, not a product) switches on and calibrates the cooking process. The end user is not permitted to obtain those services from any other provider. Is the Wholly WORD an integral part of a seamless outdoor cooking information system, or is it part of an illegal tying arrangement? And what about the bundling of the sauce with the system? Such questions require a great deal of factual analysis and are no doubt subject to numerous claims and defenses, especially in a technologically dynamic market (as all agree exists in the Microsoft case). But what, if anything, in the Final Judgment gives plaintiffs the teeth to prevent *currently unforeseen* but abusive licensing practices of the type intended to be controlled by the Judgment?

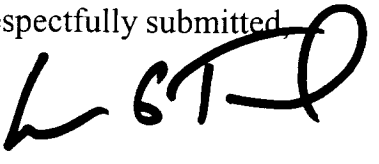
The point is that at least one major component of Microsoft's licensing scheme—its end user license agreement—is entirely omitted from regulation by the Final Judgment. The only licenses affected by the proposed settlement are those with OEMs, IAPs, ICPs, ISVs and IHVs as those businesses are defined in the Final Judgment.

The settling parties would claim that unlawful tying has not been determined, and that the issue of whether Microsoft unlawfully tied Internet Explorer with Windows was remanded to the trial court for further trial proceedings. Except for the limited controls placed on Microsoft's dealings with those listed above, Microsoft has virtually unfettered discretion, by and through its end user agreements, to require contractual terms such as those found in the ThinkSoft license—terms that are exclusionary and that may serve to artificially maintain its operating system monopoly while allowing it to unfairly leverage into new markets. Microsoft has been and will continue to be endlessly inventive in the way it advantageously and unfairly licenses its products and services.

Hence, in addition to the Technical Committee described in the Final Judgment, I propose a License Committee to be formed much like the Technical Committee and that would have oversight of any licenses or license terms inconsistent with both the letter and the spirit of the Final Judgment. The License Committee would investigate complaints from competitors, industry and consumers, consider Microsoft's permissible business objectives, and then proceed in a manner analogous to the Technical Committee. It would help prevent Microsoft from accomplishing indirectly through its end user agreements (or any other licenses) that which it is expressly forbidden from doing with the licensees specified in the Judgment. The License Committee could never interfere with any activity Microsoft characterizes as innovation. Creative licensing that effects an end-around the Final Judgment isn't innovation; it's legal weaseling.

Another reason to form a License Committee is to at least have the semblance of punishment for the pernicious conduct found to have occurred. Microsoft is a predator, an impermissible monopolist in the software market, yet the Final Judgment proposes no punishment. If Microsoft perceives this as punishment, then all the better; it is far less and avoids the complexities of a structural remedy. Oversight from a License Committee is not much punishment, but Microsoft has demonstrated that on the unlevel playing field it alone unlawfully created, a "playground supervisor" is needed. Otherwise, make-nice behavioral controls, promulgated by well-meaning Microsofties, will once again prove to be bootless. Stated differently, a remedy that includes no punishment is no remedy at all; its remedial effect is a fiction that, if written into a novel, would be dismissed as implausibly lenient.

Respectfully submitted,



Lawrence G. Townsend

cc: Thomas W. Burt
John Warden, Esq.
State Attorneys General of New York, California, Connecticut, D.C., Florida, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, New Mexico, North Carolina, Ohio, South Carolina, Utah, Virginia and Wisconsin